MYRON CHERRY

IBLA 84-190 Decided June 12, 1985

Appeal from a decision of the Colorado State Office, Bureau of Land Management, declaring mining claims C MC-125506, C MC-125507, C MC-125509 through C MC-125565, and C MC-163816 abandoned and void for failure to file proof of labor or notice of intention to hold the claims.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- Mining Claims: Abandonment

   The failure to file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982) and 43 CFR Subpart 3833, in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

2. Constitutional Law: Generally -- Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim

   In United States v. Locke, 105 S. Ct. 1785 (1985), the United States Supreme Court held that sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), is constitutional. Sec. 314 provides that upon the failure of a mining claimant to file either evidence of the performance of annual assessment work or a notice of intention to hold a mining claim, the claim is conclusively presumed to be abandoned and void. Therefore, a mining claimant is not deprived of due process where his claim is rendered abandoned and void for failure to timely make the required filing.

APPEARANCES: Myron Cherry, Las Cruces, New Mexico, pro se.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Myron Cherry appeals from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated November 4, 1983, declaring mining claims C MC-125506, C MC-125507, C MC-125509 through C MC-125565, and C MC-163816 abandoned and void for failure to file either evidence of assessment work or a notice of intention to hold the claims on or before October 22, 1979.

In its decision BLM found that "[w]hile copies of the notices of location were timely filed on October 15, 1979, the required evidence of assessment work, or notice of intention to hold the claim(s) was not filed with the notices of location on October 15, 1979, nor prior to October 22, 1979." BLM then stated:

> The Interior Board of Land Appeals has held repeatedly that the conclusive presumption of abandonment which attends the failure to file an instrument required by Section 314 of FLPMA is imposed by the statute itself. "A matter of law, it is self-operative and does not depend upon any act or decision of an administrative official." Further, the law does not provide authority to waive or excuse non-compliance nor does it afford claimants any relief from the statutory consequences. We are, therefore, closing our records regarding the above claim(s).

On appeal, Cherry argues that he has been unconstitutionally deprived of his property without due process, citing Rogers v. United States, 575 F. Supp. 4 (D. Mont. 1982). Cherry also asserts that he has acted in good faith and that the problem was due to the negligence of BLM in failing to notify him of the deficiency.

[1] The Board has consistently held that under section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1982), the owner of a mining claim located on or before October 21, 1976, must file notice of intention to hold the claim, or evidence of the performance of annual assessment work on the claim, in the proper BLM office on or before October 22, 1979, and on or before December 30 of each year thereafter. This requirement is mandatory, and the failure to comply is deemed conclusively to constitute an abandonment of the claim by the owner, and render the claim void. E.g., Dan Walker, 74 IBLA 153 (1983), Don G. Gilbertson, 59 IBLA 143 (1981); Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981). See 43 U.S.C. § 1744(a), (b), and (c) (1982); 43 CFR Subpart 3833. The statutory and regulatory requirements are met only where a claimant files with BLM within the requisite time periods a copy of the affidavit of labor or notice of intention to hold the claim.

[2] Appellant cites Rogers v. United States, supra, and implicitly argues that he did not intend to abandon his claims and that BLM cannot declare his claims abandoned and void without first affording him due process, consisting of notice and an opportunity for hearing.

In Rogers v. United States, supra, the court held that the failure of section 314 of FLPMA to provide for notice and an opportunity for hearing prior to determination that claims were abandoned and void violated procedural due process. In Locke v. United States, 573 F. Supp. 472 (D. Nev. 1983), the court similarly found a violation of due process. However, in United States v. Locke, 105 S. Ct. 1785 (1985), the United States Supreme Court reversed the lower court decision in Locke.

In Locke the Supreme Court considered the constitutionality of section 314(c) of FLPMA. The Court held section 314 constitutional and noted that "we find that Congress intended in § 314(c) to extinguish those claims for which timely filings were not made. Specific evidence of intent to abandon is simply made irrelevant by § 314(c); the failure to file on time, in and of itself, causes a claim to be lost." 105 S. Ct. at 1795-96. Thus, Cherry's failure to timely file the required evidence of assessment work or notice of intention to hold the claims constitutes abandonment of his claims. In accordance with United States v. Locke, Cherry was not deprived of due process.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

R. W. Mullen
Administrative Judge